United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

To be argued by: Lewis M. Steel

74-1415

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-1415

NELLIE HILL, et al.,

Plaintiffs-Appellants,

-vs.-

THE NEW YORK CITY HUMAN RESOURCES ADMINISTRATION, et al.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW

Given the factual posture of this case, are appellants entitled to preliminary relief under the doctrine of Chance, Vulcan Society, and Guardians Association?

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PRELIMINARY STATEMENT AND PROCEDURAL HISTORY

Appellants in this class action are non-white provisional employees of Youth Services Agency (hereinafter YSA) of the New York City Human Resources Administration. They and the members of their class will be fired unless this Court preliminarily enjoins appellees from replacing them by appointing persons from Civil Service eligibility lists.

Appellants assert in this Title 42, §1983 action, that the Civil Service tests utilized by Appellees were racially biased and non-job related.

The complaint was filed on March 12, 1974. On March 14, 1974, the Honorable Morris K. Lasker entered a temporary restraining order prohibiting appellees from making permanent appointments to the three challenged YSA job categories in order to preserve the status quo while statistics were submitted and analyzed. (24 a)*

On March 26th, the day after final papers were submitted on the motion for preliminary inspection, including the affidavit of Appellants' expert, Professor Richard Cloward, which concluded that two out of the three tests administered were racially biased (68 a), the court below held a chambers conference to discuss the status of the case (71 a). At that conference, a question arose concerning the usefulness of the statistics supplied by YSA. Appellants offered to call Professor Cloward as a witness if the court had any question as to the validity of his analysis and conclusions. The court deemed that this would not be necessary. (83 a).

* "a" refers to Appellants' appendix.

On March 27, 1974, appellants' motion for preliminary injunction was denied. Stating that "good arguments can be made both for granting relief and denying it" (80a), and that "reasonable men may differ" with regard to whether a preliminary injunction should be granted (76a), the court granted a forty-eight hour stay so that appellants could seek a stay in this Court. Thereafter, on March 28, 1974, the court extended the stay until April 2, 1974 (77a).

This Court, on April 2, 1974, granted appellants' motion for a stay pending this accelerated appeal (103a).

STATEMENT OF THE CASE

a) The Qualifications of Appellants

Appellants have been working as YSA employees for many years, e.g., McNair -- 10 years (36a); Acevedo -- 8 years (41a); Gadsen -- 4 years (44a); Hill -- 5 years (26a). They have received excellent ratings, e.g., McNair (38a); Gadsden (45a); Hill (27a). Some have received internal promotions while at YSA, e.g., Hill (26a); McNair (36a); Acevedo (42a); Gadsden (44a). One of the appellants is the deputy director of the Neighborhood Youth Corp. (McNair 36a); another is a supervisor of a YSA field unit (Acevedo 41a).

Appellees presented no evidence to challenge the performance of Appellants.

b) The Civil Service Examinations

This case challenges three open competitive examinations. For the lowest job title, Assistant Youth Services Specialist (hereinafter AYSS), a training and experience examination (Exam #3004) was given in March of 1973, and an eligible list was published in October 1973 (56 a).

The other two titles required written exams. The Youth Services Specialist (hereinafter YSS) exam (#2181) was given in January 1973, and the list was published in October, 1973; the Assistant Supervisor of Youth Services (hereinafter ASYS) exam (#2253) was given in February, 1973 and that list was published in December (56 a).

c) The Statistics Provided by YSA

The YSA statistics submitted to the court below were broken down into pass-fail or qualified-not qualified categories. This breakdown method does not indicate who will actually be offered permanent positions, as many of the so-called "passes" fall well below the numbers on the eligible lists which will be reached for appointments in the foreseeable future.

According to the YSA statistics, 1029 of 1239 persons who took the AYSS "passed." YSA was aware of the ethnic identity of 9% of the "passers" and 3% of those who failed (57-8a). Both parties have agreed that this is not a statistically reliable sample (62a, 66a). At oral argument, however, on the application for a stay before this Court, both parties agreed that because of the interrelationship between the three job categories, the court should treat all categories similarly. Therefore, this court entered the stay as to the AYSS category.

YSA figures show that 215 out of 704 "passed" the YSS exam. The ethnic identity of 44% of the passers and 16% of the failers was known. The ethnic breakdown is as follows:

	% "Passing"
White	72%
Black	45%
Hispanic	50%

(58a)

YSA figures for the ASYS category show that 266 out of 404 persons "passed." The ethnic identity of 28% of the passers and 16% of the failers was known. The ethnic breakdown is as follows:

	% "Passing"
White	94%
Black	61%
Hispanic	93%

Appellees, in an affidavit submitted by their counsel, claim their own figures are unreliable for purposes of this litigation (62a, 64a). Appellees did not submit any analysis from an expert.

d) The Appellants' Statistical Analysis

Appellants asked Richard A. Cloward, a professor of social sciences at Columbia University, to analyze the YSA statistics.* In an effort to roughly correlate the pass-fail statistics to actual job openings, Cloward determined that the "pass" category should be divided into "high pass" and "low pass." Cloward then concentrated on an analysis of the high passers, as the permanent appointments would basically come from this group. Cloward constructed the following tables to reflect the high pass rates for the two categories from which he could draw statistically relevant conclusions:

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* Professor Cloward's qualifications appear at 65a.

Examination No. 2181
Youth Services Specialist

Ethnicity	High Pass No. 1-150	Low Pass 151-215	Failed	Total	% High Pass
White	28	6	13	47	59%
Black	38	3	47	88	43
Hispanic	10	7	18	35	29

Examination No. 2253
Assistant Supervisor Youth Services

Ethnicity	High Pass No. 1-50	Low Pass 51-266	Failed	Total	% High Pass
White	14	15	3	32	44%
Black	5	22	17	44	11
Hispanic	2	12	1	15	13

(69a)

In his affidavit, Cloward pointed out that although the YSA raw data was incomplete (66a, 68a), he could reach meaningful statistical conclusions in the absence of further data (68a).

With regard to the YSS examination, Cloward concluded:

> I conclude from these figures that the examining procedures appear to be racially biased, given the relatively great disparity between whites and Blacks, and the exceedingly great disparity between whites and Hispanics. Disparities of this magnitude would rarely occur by chance. (67a)

Cloward stated with regard to the ASYS test:

> I found that 44% of whites scored high, but only 11% of Blacks, and 13% of Hispanics. These disparities are striking and would hardly have been expected by chance.
>
> I conclude, therefore, that there is strong reason to suspect the influence of racial bias in the testing procedure. (68a)

In the event further statistics could not be provided, Cloward stated that from the available data, he would conclude the "examination procedures being employed [in the two tests] are racially biased." (68a)

e) The Equities

The court below recognized that denial of preliminary relief could "impose substantial hardships on the plaintiffs" (75a), but ruled against them because he found that they had delayed filing suit until shortly before their dismissals, thereby limiting the amount of time available to make a full statistical survey. The record facts on this issue are as follows:

Appellants, depending on the test, learned of the results from October through December, 1973 (56a). The uncontroverted affidavits of appellants McNair and Gadsden, however, indicate that the dates on which the exam results

were announced do not alone resolve the issue as to whether appellants filed this action late.

McNair stated in paragraph 12 of his affidavit (37a) that although he had "passed" the examination, he was not notified until January of this year that he would be replaced by someone who had received a higher passing score. The McNair affidavit not only explains the delay in filing but substantiates the validity of Professor Cloward's distinction between "high pass" and "pass" statistics.

The Gadsden affidavit states that she was not notified that she was to be fired until February, 1974 (45a). Even after she was so informed, the YSA Director of Personnel told her that she wasn't sure that plaintiff Gadsden would be fired because "there was much confusion" (49-50a).

ARGUMENT

THE CHANCE, VULCAN AND GUARDIANS ASSN. TRILOGY MANDATE A PRELIMINARY INJUNCTION UNDER THE FACTS OF THIS CASE

The court below found with regard to at least one of the tests (the YSS exam) that:

> At first blush, the showing of disparity in passing rates between Whites on the one hand and the two other groups on the other is disquieting. That is, if such a disparity were proven at trial, it would as a matter of law establish the racially disproportionate impact of the examination. Chance v. Board of Examiners, 330 F. Supp. 203 (S.D.N.Y. 1971), aff'd, 458 F. 2d 1167 (2d Cir. 1972). (73a).

The statistical showing for the other written test was even clearer. For in the YSS test the White-Black-Hispanic high pass ratio was 59%-43%-29%. In the ASYS test the White-Black-Hispanic high pass ratio was 44%-11%-13% (69a).

Under Chance, a plaintiff in an action such as this has the burden of proving racially disproportionate impact in order to be entitled to preliminary relief. Once such impact is established, the public agency involved then has a heavy burden of justification placed upon it to show that the challenged

tests are appropriately job-related. No validation of job relatedness was even suggested here.

The court below ruled that Chance did not apply because he found that statistics were not of a sufficiently certain nature to guarantee that the "first blush" findings would ultimately be sustained. This finding is totally unsupported on the record. Only appellants submitted an expert's analysis of the data. While this expert did point out that more data could lead to greater certainty, he concluded that the available raw data provided a sufficient pool of information for him to reach meaningful conclusions. He concluded that two of the examinations were racially biased.

Vulcan Society v. Civil Service Commission, 490 F. 2d 387 (2d Cir. 1973) makes clear that the data need not be complete for preliminary relief to be appropriate. In Vulcan, the figures were based upon the "rather crude procedures" of sight surveys which "doubtless led to error in some cases." 490 F. 2d at 392. The court pointed out that "a racially disproportionate impact" need not be proved "with complete mathematical certainty. 'Certainty generally is illusion, and repose is not the destiny of man.'" 490 F. 2d at 393.

Vulcan also commented upon the importance of the distinction between the mere passing of an exam, and the achievement of a high enough score to obtain appointment. 490 F. 2d at 392. The court below, however, used YSA's non-expert analysis, rather than the Cloward high pass-low pass criteria which better focused the racially disproportionate impact of the exams. In not following Vulcan in this regard, and by imposing upon appellants a higher standard of statistical certainty than is required by Vulcan, the court below seriously erred.

The District Court also erred when it overlooked the method of analysis and conclusions of Professor Cloward prior to the holding of a hearing. Guardians Association v. Civil Service Commission, 490 F. 2d 400, 403 (2d Cir. 1973). At a Chambers conference prior to its decision, appellants offered to produce Cloward for examination to clarify any questions the court or parties might have as to his method of analysis and his conclusions. The court deemed this would not be necessary (82-83a). Such a hearing could have been conducted expeditiously. In its absence, and in the absence of conflicting submissions from a competent expert, appellants were entitled to relief. Chance, Vulcan, Guardians Association.

Additionally, the equities in this case point to the compelling need for preliminary relief. Unlike every other case alleging racially disproportionate impact in Civil Service exams which appellants have found, this case alone involves a situation whereby long-standing incumbent employees with excellent performance ratings will lose their jobs if relief is denied.* In the other cases, no loss of jobs was threatened. There is no justification to penalize appellants because they did not file suit instantly upon the posting of the Civil Service lists. This is especially so when it appears that they were not notified that they would lose their jobs until January or February of this year.

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* Parenthetically, we also note that it is highly unlikely that defendants will be able to sustain their heavy burden on the job-relatedness of the exams. One method of validation of an examination employs a comparison between test scores on prior similar exams and the subsequent job performance of appointees who took exams. The other method compares the scores of current employees with their job performance. See Vulcan Society, 490 F. 2d at 394. In this case, the anomalous situation is presented of incumbents who have performed well at their jobs for numbers of years who cannot receive permanent appointments because of their scores on an exam which purports to test their ability to perform well at the jobs they already hold.

CONCLUSION

For the above stated reasons, the order below should be vacated and the case remitted to the trial court with instructions to enter a preliminary injunction.

Respectfully submitted,

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Dated: April 10, 1974